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TAX AND EXCHANGE CONTROL ALERT

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SARS EASES THE COMPLIANCE BURDEN ON CERTAIN GENEROUS TAXPAYERS

On 2 September 2014, the South African Revenue Service (SARS) first issued Binding General Ruling 24 (Ruling). The Ruling dealt with some of the requirements that need to be met under s18A of the Income Tax Act, No 58 of 1962 (Act), in order to qualify for a deduction in terms of s37C(3) of the Act. However, due to the uncertainty that persisted regarding the application of these provisions, SARS reissued the Ruling on 15 February 2016.

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SARS'S INVESTIGATIVE POWERS – A POSSIBLE BACKSTAGE PASS TO MATTERS PENDING BEFORE COURT?

The taxpayer is saddled with defending itself in respect of a tax period before court while simultaneously sourcing and providing relevant material, pertaining to the same legal issues for an audit of a later tax period.

Is it procedurally fair for a taxpayer engaged in a dispute before the Tax Court to be subjected to a parallel process under the TAA concerning essentially the same dispute?

Chapter 5 of the Tax Administration Act, No 28 of 2011 (TAA) confers a broad range of information-gathering powers on the South African Revenue Service (SARS).

Taxpayers are often assessed for more than one tax period at a time, however, the waters become muddied when there are parallel processes carried on in which the issues being investigated by SARS, overlap with disputes pending before the Tax Court. The taxpayer is then saddled with defending itself in respect of a tax period before court while simultaneously sourcing and providing relevant material pertaining to the same legal issues for an audit of a later tax period. In these circumstances, there is often an overlap of facts, law and witnesses which will ultimately be presented in court, thus rendering the information gathering process questionable.

The following question arises: Is it procedurally fair for a taxpayer engaged in a dispute before the Tax Court to be subjected to a parallel process under the TAA concerning essentially the same dispute? Parallel processes are concerning because they give SARS the potential to gain insight into the taxpayer's litigation strategy as well as obtaining a preview of witnesses' testimony prior to trial. This is, of course, impermissible in law as it is a direct infringement of a taxpayer's right to litigation privilege. In civil and criminal litigation these problems are avoided by means of the *lis albi pendens* rule, which prevents parties from replicating proceedings in different forums and protects the litigants from breaching the rules of litigation such as litigation privilege.

The correlating rule of *lis albi pendens* is *res judicata*, the purpose of which is to prevent a party from reopening a case where a court has already ruled on the matter. Section 99(1)(e) of the TAA provides that SARS may not make an assessment that has been resolved under Chapter 9 of the TAA. In effect this section is similar to the concept of *res judicata*. The question that then arises is whether SARS can conduct parallel proceedings, such an audit to gather information in respect of later years of assessment, where the very same issues are already pending before the Tax Court? Consequently, can a taxpayer use the rules of litigation to prevent SARS from proceeding with an audit?

An immediate difficulty of raising these rules of litigation in tax matters is that the provisions of the tax acts are amended on an annual basis and thus issues in a particular tax period may be factually identical but legally different from those in later tax periods. In other words, the parties and the facts of the matters may be the same, but the applicable taxing provisions may be different.

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SARS'S INVESTIGATIVE POWERS – A POSSIBLE BACKSTAGE PASS TO MATTERS PENDING BEFORE COURT?

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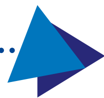
To the extent that the taxpayer is prejudiced, in that its right to litigation privilege is infringed, it will need to make out a clear case of prejudice in order to prevent SARS's investigation from proceeding.



The other problem is that the rules of *res judicata* and *lis albi pendens* apply specifically in the context of litigation. The provisions dealing with information gathering are contained in Chapter 5 of the TAA and are primarily investigative mechanisms used by SARS "for purposes of the administration of a tax Act". It would thus not be possible to invoke the rules of *lis albi pendens* in matters where there is an overlap between a field audit, which is administrative in nature, and pending litigation. SARS is, however, constrained from exceeding the scope of its powers in the following respects:

- SARS may only request information, in terms of s46(1) of the TAA, "for purposes of the administration of a tax Act". It may not use its investigative powers with the intention of seeking evidence to conduct its defence in a matter before the Tax Court; and
- SARS is precluded from interviewing witnesses without having regard to the rules of litigation privilege. SARS may use the information gathering provisions in Chapter 5 to interrogate the taxpayer's witnesses but only for a legitimate purpose and in a manner that does not undermine the fairness of litigation.

In cases where there is a dispute running in parallel with a field audit, a taxpayer may have limited grounds to prevent the latter from proceeding. To the extent that the taxpayer is prejudiced, in that its right to litigation privilege is infringed, it will need to make out a clear case of prejudice in order to prevent SARS's investigation from proceeding.

Should SARS continue to use its investigative powers to probe the taxpayer's privileged information and exceed the scope of its powers, the taxpayer will have the option of challenging SARS to a review in terms the Promotion of Administrative Justice Act, No 3 of 2000.

Yashika Govind

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SARS EASES THE COMPLIANCE BURDEN ON CERTAIN GENEROUS TAXPAYERS

Section 37C of the Act incentivises the conservation of ecologically-viable areas by enabling taxpayers to claim various tax deductions for these endeavours.

Based on the above, SARS ruled that an amount claimed under s18A and that is for the purposes of s37C(3) deemed to be a donation, will qualify for a deduction notwithstanding the fact that a receipt as prescribed in s18A(2) has not been issued.

On 2 September 2014, the South African Revenue Service (SARS) first issued Binding General Ruling 24 (Ruling). The Ruling dealt with some of the requirements that need to be met under s18A of the Income Tax Act, No 58 of 1962 (Act), in order to qualify for a deduction in terms of s37C(3) of the Act. However, due to the uncertainty that persisted regarding the application of these provisions, SARS reissued the Ruling on 15 February 2016.

Section 37C of the Act incentivises the conservation of ecologically-viable areas by enabling taxpayers to claim various tax deductions for these endeavours. Section 37C(3) specifically provides for the tax deductibility of expenditure actually incurred by a taxpayer to conserve or maintain land owned by the taxpayer, if the conservation or maintenance is carried out in terms of a declaration that has a duration of at least 30 years under s20, s23 or s28 of the National Environmental Management: Protected Areas Act, No 57 of 2003. These sections relate to the declaration of an area as a national park, nature reserve or protected environment, subsequent to a notice being issued by the relevant Minister.

Section 37C(3) of the Act deems the deductible amounts to be a donation paid or transferred to the government for which a receipt has been issued under s18A(2). However, section 18A(2) expressly prohibits a deduction under s18A(1), unless the claim is supported by the issue of a receipt. This circular reasoning created uncertainty as to whether the Act requires a receipt as envisaged in s18A(2) to be furnished to SARS in order to qualify for the deduction in s37C(3).

In order to qualify for these deductions, the requirements of s18A of the Act, which deals with the deductibility of donations, must be met. Section 18A(1)(c) provides for the tax deductibility of donations made to any government department of the Republic in the national, provincial or local sphere, carrying on an approved public benefit activity as set out in Part II of the Ninth Schedule. A taxpayer making a *bona fide* donation in cash or of property to any entity listed under s18A(1) is entitled to a deduction from taxable income if the donation is supported by the necessary s18A receipt, which must include the details as set out in s18A(2).

Based on the above, SARS ruled that an amount claimed under s18A and that is for the purposes of s37C(3) deemed to be a donation, will qualify for a deduction notwithstanding the fact that a receipt as prescribed in s18A(2) has not been issued. The Ruling applies from 15 February 2016 and is valid until it is withdrawn, amended or if the Act is amended.

Although it is not clear what percentage of taxpayers have made use of this deduction, it is still significant that SARS is willing to make a concession by relaxing the compliance burden on the taxpayer. This is especially significant in light of the provisions of the Tax Administration Act, No 28 of 2011 which will be amended to allow SARS to request biometric information from taxpayers. The concession made by SARS's interpretation of s18A(2) and s37C(3) is a welcome one.

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